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No. 00-6677

IN THE

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

vs.

GARY L. JOHNSON, Director, Texas Department of Criminal Justice Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Counsel of Record
CHARLES L. HOBSON
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

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QUESTIONS PRESENTED

1. In a case where the Texas "special issues," which were found inadequate as applied in *Penry* v. *Lynaugh*, are supplemented with instructions to answer an issue "no" if a life sentence is the appropriate response to defendant's mitigating evidence, is the state court decision affirming the sentence contrary to or an unreasonable application of *Penry* v. *Lynaugh* and *Boyde* v. *California*?

2. Where a competency examination from an earlier, unrelated case, in which it was requested by defense counsel, is used in the penalty phase for a subsequent crime, is the state court decision finding *Estelle* v. *Smith* inapplicable contrary to clearly established Federal law?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the proper interpretation of Congress's landmark reform of habeas corpus law in the Antiterrorism and

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

Effective Death Penalty Act of 1996 ("AEDPA"). This law, if properly implemented, will greatly reduce unnecessary delay in the enforcement of capital punishment and reduce the number of correct criminal judgments erroneously overturned on federal habeas. These changes would advance the rights of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In 1977, in two separate incidents, petitioner Johnny Penry raped two women at knife-point. See J. A. 19-20. In the second incident, he demonstrated sufficient mental capacity to deceive the victim. At the request of defense counsel, Penry was examined for competency by Dr. Felix Peebles. J. A. 125. The case was resolved by plea bargain, with a sentence of five years on one count and dismissal of the other. J. A. 129-130.

On October 25, 1979, Penry raped Pamela Carpenter. J. A. 21-23. Having learned the consequences of leaving a living victim to testify, he stabbed her, J. A. 23-24, with a knife he had brought for that purpose. J. A. 21-22. Mrs. Carpenter died later that day, after describing her attacker. J. A. 873-874.

Penry's first death sentence was set aside by this Court on habeas corpus in *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989) ("*Penry I*"), on the ground that the instructions, as applied to the case, did not provide the jury "with a vehicle for expressing its 'reasoned moral response' to [Penry's mitigating] evidence in rendering its sentencing decision."

On retrial, the defense's psychiatric expert relied on Dr. Peebles' report. J. A. 326-327. The prosecution expert relied on the same report. J. A. 456. The experts disagreed as to whether Penry was, in fact, mentally retarded. J. A. 279, 482.

The Court gave supplemental instructions on mitigating evidence and personal culpability designed to remedy the problem in *Penry I*. See J. A. 675. The jury returned "yes" answers to the special issues, and Penry was sentenced to death. The Texas Court of Criminal Appeals affirmed, after reviewing

"135 points of error," in an opinion spanning 108 pages of the Joint Appendix. Penry's case was further reviewed by the same court on habeas corpus, J. A. 863, following an evidentiary hearing and extensive findings of fact by the trial court. J. A. 795-862. The United States District Court then thoroughly reviewed Penry's claims on federal habeas. J. A. 865-1036. The Court of Appeals denied a certificate of appealability. J. A. 1037. This Court granted a writ of certiorari.

SUMMARY OF ARGUMENT

The issue of availability of relief under 28 U. S. C. § 2254(d) should be addressed as a threshold matter, before and usually in lieu of the merits of the underlying decision, to avoid advisory opinions and to further the purpose of the statute.

The state court decision is not contrary to *Penry I*, as the present case is more than materially distinguishable on both the instructions and the prosecutor's argument. The state court correctly recognized and reasonably applied *Penry I* and *Boyde* v. *California*.

The question of whether the rule of *Estelle* v. *Smith* should be extended to the facts of the present case should be analyzed under the "clearly established" element of the statute, and the analysis is essentially the same as under *Teague* v. *Lane*. The present case differs markedly from *Smith*, in that the mental examination (1) was requested by defense counsel; (2) related to a prior crime for which criminal proceedings had concluded; and (3) was relied on by the defense's own expert. Extension of *Smith* to these facts would be a new rule, and a wrong rule.

ARGUMENT

I. The AEDPA issue should be resolved first, as a "threshold matter."

Before we address the merits of the case, there is an important methodology question which has divided the circuits.

Should a court addressing an issue subject to 28 U. S. C. § 2254(d) decide whether petitioner's claim meets the criteria of that section first, or should it go to the merits of the underlying question first and only address the statutory standard if it disagrees with the state court's conclusion? Compare *Tran* v. *Lindsey*, 212 F. 3d 1143, 1154-1155 (CA9 2000), cert. denied, 148 L. Ed. 2d 274, 121 S. Ct. 340 (2000) (sometimes cited as "*Van Tran* v. *Lindsey*"), with *Bell* v. *Jarvis*, No. 98-7002 (CA4 Dec. 29, 2000) (en banc) (slip op., at 14-16) (criticizing *Tran*). The difference between the two approaches may not matter much in this individual case, but multiplied over the tens of thousands of habeas cases per year, it is important. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1999, Table 5.70, p. 465 (2000).

The Court has addressed the order of consideration of claims in several different contexts. Resolvability of a claim on one ground may make the answering of another question unnecessary, undesirable, improper, or even illegitimate. Jurisdiction goes to the head of the line, for without jurisdiction there is no legitimate authority to decide anything else. See *Steel Co.* v. *Citizens for a Better Environment*, 523 U. S. 83, 94, 101-102 (1998). There is also a venerable rule that a case should be resolved on nonconstitutional grounds if the constitutional question, and hence potential or actual conflict with the legislative branch, can be avoided. See *Liverpool, New York, and Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885).

In habeas cases, the usual order is to decide "general prerequisites" such as custody, exhaustion, and procedural default first, see *Lambrix* v. *Singletary*, 520 U. S. 518, 524 (1997), although Congress has authorized an exception for the dismissal on the merits of meritless but unexhausted applications. See 28 U. S. C. § 2254(b)(2). The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) follows these determinations but precedes the underlying question. See *Lambrix*, 520 U. S., at 524; *Penry* v. *Lynaugh*, 492 U. S. 302, 329 (1989) ("threshold

matter"). The first question in the present case is where the § 2254(d) issue is to be resolved.

There is a substantial overlap between the analysis needed to resolve a § 2254(d)(1) issue and a *Teague* issue. See *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000) (comparing *Teague* "old rule" with § 2254(d)(1) "clearly established"). This overlap suggests an efficiency in addressing these two issues consecutively, before the underlying question. If the claim is barred by either or both rules, there will be no need to address the "merits" of the petitioner's claim.

The practical appeal of this approach is reinforced by both jurisprudential considerations and respect for the intent of Congress. The reason why *Teague* is a threshold matter is that announcing a new rule in a case where the rule does not affect the outcome would be an advisory opinion. See *Teague*, *supra*, 489 U. S., at 316 (plurality opinion). That is, once a court decides that petitioner's proposed rule is new and does not qualify for an exception, the question of whether the rule ought to be adopted has no effect on the outcome of the case before the court. Courts have legitimate authority to make law, especially constitutional law, only in the course of deciding cases. See *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 177-178 (1803); *Muskrat* v. *United States*, 219 U. S. 346, 360-361 (1911); 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 2.13(b), p. 177 (2d ed. 1999). Once the court decides under *Teague* that the petitioner would not be entitled to relief even if he were right on the "merits," its legitimate precedent-making authority ends.

In this sense, § 2254(d)(1) is the same kind of rule as *Teague*. Where it applies, it precludes collateral relief regardless of the validity or invalidity of the underlying claim. This issue, like *Teague*, should therefore be addressed as a threshold matter.

Respect for the intent of Congress and the purpose of the AEDPA also favors this approach. The central purpose of the

statute, voiced uniformly by its supporters, is to reduce the unconscionable delays in habeas corpus, particularly in capital cases. See 141 Cong. Rec. 14,734 (1995) (statement of Sen. Feinstein); *id.*, at 15,062 (statement of Sen. Hatch); *id.*, at 15,019 (statement of Sen. Specter); *id.*, at 15,036-15,037 (statement of Sen. Nickles). Specifically addressing § 2254(d), Senator Hatch, the provision's principal sponsor, noted "Federal habeas corpus proceedings have become, in effect, a second round of appeals in which convicted criminals are afforded the opportunity to *relitigate* claims already considered and rejected by the state courts." *Id.*, at 15,062, col. 2 (emphasis added); see also K. Scheidegger, Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform 27-28 (1995).

In *Williams*, Justice Stevens acknowledged that "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." 529 U. S., at 386 (opinion of Stevens, J.). "That acknowledgment is correct and significant to this case. It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Id.*, at 404 (majority opinion).

For § 2254(d)(1) to achieve its purpose, it is not enough to preclude relief; it must preclude relitigation. The state's primary interest in habeas reform was not to block relief in cases where it is warranted. But see *infra*, at 13 (problem of erroneous grants of federal relief in cases correctly decided by state courts). Rather, it was to reduce the "burden of federal relitigation of state decisions . . . ." S. O'Connor, Local Control of Crime, Address to the Attorney General's Crime Summit 5 (Mar. 4. 1991), reprinted in Habeas Corpus Issues: Hearings before the House Subcommittee on Civil and Constitutional Rights, Serial No. 39, 102d Cong., 1st Sess., at 192, 197 (1991). In habeas, as in immunity, once the respondent is forced to litigate the question, most of the value of the protection is lost. Cf. *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985).

Determining whether another court's decision is within reason is typically much easier and faster than deciding the underlying question *de novo*. The doctrine of law of the case, as applied to decisions of coordinate courts, is analogous to § 2254(d). See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 914-916, 953 (1998). In that context, this Court admonished the courts of appeals not to "squander private and public resources." *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 818-819 (1988). Instead, once the second court finds the first court's decision "plausible, its . . . inquiry is at an end." *Id.*, at 819.

Tran offered three reasons for deciding the underlying question first. None is persuasive. First, *Tran* noted that *Weeks* v. *Angelone*, 528 U. S. 225 (2000) decided first that the state court decision was correct, and only then addressed the AEDPA limitation. See *Weeks*, at 237; *Tran*, *supra*, 212 F. 3d, at 1155. The obvious reason is that *Williams* v. *Taylor*, *supra*, was pending but not decided at the time, and decision in this order avoided the not-yet-resolved issue of the § 2254(d)(1) standard. That reason no longer applies.

The second reason was a reference to the qualified immunity cases. *Tran*, *supra*, 212 F. 3d, at 1155. *Siegert* v. *Gilley*, 500 U. S. 226, 232 (1991) decided that "determination of whether the plaintiff has asserted a violation of a constitutional right at all" first "permits courts expeditiously to weed out suits which fail the test . . . ." But see *id.*, at 235 (Kennedy, J., concurring in the judgment). Qualified immunity differs from § 2254(d) in that "clearly established" is determined at a greater level of specificity. In *Williams* v. *Taylor*, *supra*, 529 U. S., at 413-414 (opinion of O'Connor, J.), the "reasonable probability" standard for ineffective assistance was "clearly established," while in *Anderson* v. *Creighton*, 483 U. S. 635, 639-641 (1987) "probable cause" was deemed too general. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Saucier* v. *Katz*, No. 99-1977, pp. 25-26 (contrasting meaning of

"clearly established" in the two contexts). The basis of *Siegert* is that the decision of a "purely legal question," *Siegert*, 500 U. S., at 232, is typically more expeditious than the case-specific inquiry needed to ascertain whether the officer's actions violated the alleged right and therefore provides the quicker path to resolution of the case. The merits of the habeas claim, in contrast, is typically not a "purely legal question." *Tran* simply ignores the underlying rationale of *Siegert*, which points in the opposite direction for application of § 2254(d).

The final reason given by *Tran* is to "provide[ ] guidance for state courts . . . ." 212 F. 3d, at 1155. In the federal courts of appeals, where most habeas cases will end, this "guidance" is not worth the delay, expense, and dubious legitimacy of writing opinions on points which do not affect the outcome. The opinions are not binding on state courts. See *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 58-59, n. 11 (1997); *id.*, at 66, n. 21; *Lockhart* v. *Fretwell*, 506 U. S. 364, 375-376 (1993) (Thomas, J., concurring). There is certainly no shortage of case law on constitutional criminal procedure. Questions bypassed on habeas can be considered in due course on direct review. See, *e.g.*, *Holland* v. *Illinois*, 493 U. S. 474, 486 (1990) (resolving issue left open in *Teague*). The federal courts of appeals "have no reason to presume state courts are in need of [their] guidance in interpreting and applying the controlling Supreme Court precedents." *Bell* v. *Jarvis*, No. 98-7002 (CA4 Dec. 29, 2000) (en banc) (slip op., at 16). *Tran*'s mandate to write pointless opinions sends an unfortunate and incorrect message that federal courts do not have enough to do. Cf. *Watt* v. *Alaska*, 451 U. S. 259, 274 (1981) (Stevens, J., concurring). It should be expressly disapproved.

As we will show in the following parts of this brief, the Texas Court of Criminal Appeals recognized the correct precedents for this case and applied them reasonably to the facts. That is sufficient to preclude relief under § 2254(d)(1). Having decided enough to determine the outcome, a habeas court should stop. There is no justification for delaying a

decision to opine on questions which do not affect the outcome, and such delay would be contrary to the purpose of Congress in enacting this statute.

II. The state court decision on the jury instruction is not "contrary to . . . clearly established Federal law, as determined by the Supreme Court . . . ."

The leading clause of 28 U. S. C. § 2254(d) establishes a general rule of claim preclusion. Unless one of the exceptions is met, a claim adjudicated on the merits in state court is not a ground for federal habeas relief. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 946 (1998); 141 Cong. Rec. 15,058, col. 1-2 (1995) (statement of Sen. Biden). The exception in paragraph (2) of this subsection, relating to factual findings, is not presented in this case. The exception in paragraph (1) has two clauses, which have independent meaning. See *Williams* v. *Taylor*, 529 U. S. 362, 404-405 (2000). We address the first clause in this part and the second clause in part III, *infra*.

Under the statute, relief may be granted despite the prior adjudication if the state court decision "was contrary to . . . clearly established federal law, as determined by the Supreme Court of the United States . . . ." *Williams* endorsed the Fourth Circuit's interpretation of this clause in *Green* v. *French*, 143 F. 3d 865 (1998).

> "First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Williams*, *supra*, 529 U. S., at 405.

A. Rule Selection.

The first part of this test refers to the state court's selection of the governing rule, as opposed to its application of the rule to the facts of the case. For example, a decision that correctly identified *Strickland* v. *Washington*, 466 U. S. 668 (1984) as the rule for ineffective assistance claims is not "contrary to" controlling law, regardless of how much a federal court might disagree with the state court's application of the rule. The latter question falls under the second clause. See *Williams*, *supra*, 529 U. S., at 406.

Petitioner apparently does not claim that the state court erred in rule selection. In his only mention of the governing statute, he invokes the "materially indistinguishable" and "unreasonable application" tests, but not the "contradicts the governing law" test. See Brief for Petitioner 12.

This is a wise concession, because the state court clearly did recognize and apply the correct controlling precedents. The defendant contended on appeal that the jury instructions on retrial failed to implement the requirement of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) (*Penry I*). Since the additional instructions were clearly intended to do just that, see Brief for Petitioner 9, the question is whether they were susceptible to misinterpretation by the jury to a degree sufficient to warrant reversal. The controlling case for that question is *Boyde* v. *California*, 494 U. S. 370 (1990). See Brief for Petitioner 12-13.

The state court recognized and applied the correct rules. It relied on its prior opinion in *Coble* v. *State*, 871 S. W. 2d 192, 207 (Tex. Crim. App. 1993). See J. A. 782. *Coble* relied on *Fuller* v. *State*, 829 S. W. 2d 191, 209 (Tex. Crim. App. 1992). *Fuller*, in turn, correctly recognized *Penry* as the governing rule for the substantive question and *Boyde* as the governing rule for the claimed ambiguity. See *ibid.*

B. "Materially Indistinguishable."

Defendant contends that the present case is "materially indistinguishable" from *Penry I*, Brief for Petitioner 12, yet the argument in support of this contention is just a straight "merits" argument of the kind that would have been appropriate under the now-repealed regime of *de novo* review. See *id.*, at 12-24. Accepting this argument would strip the term "materially indistinguishable" of any meaning. Far worse, it would strip the statute of any meaning and return to the *status quo ante*. It would be precisely the step the Court rejected in *Williams*. See 529 U. S., at 404.

The facts of the present case are more than distinguishable from *Penry I*, and the differences are more than material. The jury in *Penry I* did not receive "*any* jury instruction on mitigating evidence." 492 U. S., at 322 (emphasis added). The jury on retrial did. J. A. 675. One can argue until the cows come home whether the instruction was good enough, but to claim that a case of an arguably ambiguous instruction is "materially indistinguishable" from a case with no instruction at all borders on frivolous.

The two cases are also distinguishable in the arguments of counsel. These arguments are part of the context of the proceedings, and *Boyde* tells us that context is material. See 494 U. S., at 383. In the first trial, the defense asked the jury to answer "no" to a special issue, even if the literal answer was "yes," in response to mitigating evidence. *Penry I*, *supra*, 492 U. S., at 325. The prosecutor argued in rebuttal that they could not, and the *Penry I* Court thought that was significant. See *id.*, at 325-326. In the present case, the prosecutor made the kind of argument upheld as proper in *Boyde*, *i.e.*, that the proffered factors were either not mitigating or entitled to little weight. Compare *Boyde*, 494 U. S., at 385-386, with J. A. 665-666. To say that these are material distinctions would be an understatement. "Material differences exist between this case and [*Penry I*], and the [Texas Court of Criminal Appeals'] decision is not contrary to the rule [*Penry I*] announced." *Ramdass* v.

Angelone, 530 U. S. 156, 147 L. Ed. 2d 125, 137, 120 S. Ct. 2113, 2120 (2000) (plurality opinion).

III. The state court reasonably applied *Penry I* and *Boyde* to the facts of this case.

Under 28 U. S. C. § 2254(d)(1), a federal habeas court may grant relief despite the prior adjudication of the claim "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams* v. *Taylor*, 529 U. S. 362, 407 (2000). Penry seeks to invoke this exception to the general rule of claim preclusion. See Brief for Petitioner 12.

As noted, *supra*, at 10, the state court recognized *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) (*Penry I*) and *Boyde* v. *California*, 494 U. S. 370 (1990) as the controlling precedents. These cases are further clarified in *Johnson* v. *Texas*, 509 U. S. 350 (1993). The crux of the present case is the state court's application of the *Boyde* standard to the instructions given in the second trial. The state court concluded that there was no reasonable probability that the jury understood the instructions to preclude it from giving effect to Penry's mitigating evidence. See *supra*, at 10. Was that conclusion reasonable? If so, that is the end of the case.

A. The Standard.

In *Williams*, the Court distinguished "an *unreasonable* application of federal law" from "an *incorrect* application of federal law." 529 U. S., at 410 (emphasis in original). The term "incorrect" may be appropriate for the tiny handful of cases which reach this Court for decision on the merits. However, *amicus* suggests that a change in terminology is in order, given that the vast majority of cases do not. Questions where the state and lower federal courts disagree are likely to be close questions, "and close questions, by definition, never have clearly correct answers." *Christianson* v. *Colt Industries*

Operating Corp., 486 U. S. 800, 819 (1988). When this Court answers a question, that answer is deemed correct by virtue of the Court's position as the court of last resort. See *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the result) ("we are infallible only because we are final"). However, when the state court and the lower federal court disagree and this Court denies certiorari, we do not know which is correct and may not find out until years later, if ever. Compare *Dunn* v. *Simmons*, 877 F. 2d 1275, 1279 (CA6 1989), cert. denied, 494 U. S. 1061 (1990) (Kentucky procedure violates "federal standards"), with *Parke* v. *Raley*, 506 U. S. 20, 28 (1992) (same procedure "easily passes constitutional muster"); see also Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 942 (1998). Rather than saying that the habeas court finds that the state court "applied clearly established federal law erroneously or incorrectly," *Williams*, 529 U. S., at 411, it would be better to say, where otherwise appropriate, that the habeas court disagrees with the state court's application.

Disagreement is not enough. Habeas reform was expressly premised on a rejection of the thesis that the federal court resolution of the question is necessarily better. See 141 Cong. Rec. 15,062, col. 2 (1995) (statement of Sen. Hatch); see also S. O'Connor, Local Control of Crime, Address to the Attorney General's Crime Summit 5 (Mar. 4. 1991), reprinted in Habeas Corpus Issues: Hearings before the House Subcommittee on Civil and Constitutional Rights, Serial No. 39, 102d Cong., 1st Sess., 198 (1991). Congress has commanded that the writ not issue for cases within the gray zone of reasonable disagreement. See *Williams*, *supra*, 529 U. S., at 411. The inquiry is objective rather than subjective, *id.*, at 409-411, and hence *Williams* rejected the "all reasonable jurists" standard. Even so, the state court decision would have to be far wide of the mark to be "unreasonable." In *Williams*, for example, there was "an *obvious* failure to consider the totality of the omitted mitigation evidence." 529 U. S., at 416 (O'Connor, J., concurring) (emphasis added). No such failure appears here.

B. The Application.

1. The instructions.

There were several ways to fix the problem in *Penry I*. Another special issue could be added, as the Texas Legislature did later. See Tex. Code Crim. Proc. Art. 37.071 § 2(e)(1). The term "deliberately" in the first special issue could have been defined broadly enough to encompass Penry's mitigation evidence, as *Penry I* indicated would be sufficient. See 492 U. S., at 323. The state is not constitutionally required to provide any particular vehicle, however, so long as it provides *some* method for consideration of the defendant's mitigating evidence. See *Johnson*, *supra*, 509 U. S., at 370. One such method is to supplement the special issue with an instruction telling the jurors to answer "no" to one issue if they conclude on the basis of the mitigating evidence that Penry did not deserve to be sentenced to death, even if the literal answer to the unadorned question would otherwise be yes. *Penry I* held that an argument of counsel precisely to that effect was insufficient "[i]n light of the prosecutor's argument [that they could not do so], and in the absence of appropriate jury instructions . . . ." 492 U. S., at 326. By implication, an appropriate instruction would have been sufficient, and it would have been more than sufficient absent a contrary prosecutor's argument.

In the present case, the jury was told the consequences of its answers to the special issues and then told "your answers . . . should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case." J. A. 675. The jury was then instructed to consider all the mitigating evidence, defined in accordance with *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). See J. A. 675. Then the court instructed, "If you determine, when giving effect to the mitigating evidence, if any, *that a life sentence*, as reflected by a negative finding to the issue under consideration, rather than a death sentence, *is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues*." *Ibid.* (emphasis added).

The plain and obvious meaning of this instruction is to endorse the argument made by counsel at the first trial. It is the "appropriate instruction" that *Penry I* found lacking.

To be sure, supplementing a question with an instruction to answer in a way that does not conform to the bare question is not the optimum way to write instructions. The legitimate question before this Court, however, is not whether the instruction is exemplary, but only whether it meets constitutional minimums. See *Victor* v. *Nebraska*, 511 U. S. 1, 27-28 (1994) (Ginsburg, J., concurring in part and concurring in the judgment). Instructions of this type are not unusual, and nearly all of us have encountered them at some time. Job applicants are commonly asked if they have ever been convicted of a criminal offense, yes or no, followed by instructions directing a negative answer if the offense falls below some threshold of seriousness or age. Even though the answer as directed is different from the answer to the bare question, it seems to present little difficulty.

Indeed, even the essential "reasonable doubt" instruction, given in every criminal jury trial, requires a literally false answer in a sense. If the jury believes the defendant is much more likely guilty than not, yet reasonable doubt exists, they are instructed to pronounce him "not guilty," contrary to what they believe is the truth. This instruction is not only constitutional, it is constitutionally required. See *Sullivan* v. *Louisiana*, 508 U. S. 275, 278 (1993).

A clever enough lawyer can, of course, always find some claimed ambiguity in even the clearest language. *Amicus* National Association of Criminal Defense Lawyers engages in a bizarre parsing of the instruction in a quest for unclarity. NACDL claims that the phrase "at the time" somehow restricts the manner in which the jury can use the mitigating evidence, rather than just designating the time for doing so. Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 6 (NACDL Brief). Yet that very sentence unambiguously tells the jury to use the evidence in assessing personal culpability, exactly what *Penry I* requires, see 492 U. S., at 327-

328, and the following sentence expressly tells them to do so by means of a negative finding if they find a life sentence is the appropriate response.

Amicus NACDL goes on to claim that the latter sentence permits the jury to give effect to mitigating evidence "only when mitigation was appropriate 'as reflected by a negative finding to the issue under consideration.' " NACDL Brief 6. That is quite simply *not* what the instruction says. The quoted phrase follows and unambiguously refers to "a life sentence," not to the mitigating evidence, and they had been told only three sentences earlier that the penalty "should be reflective of your finding as to the personal culpability . . . ." J. A. 675.

> "In examining the charge for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge." *Magniac* v. *Thompson*, 7 Pet. (32 U. S.) 348, 390 (1833) (Story, J.); see *Boyde*, *supra*, 494 U. S., at 378.

Only by the kind of parsing that *Boyde* disapproved, see 494 U. S., at 381, are petitioner and *amicus* NACDL even able to argue that the instructions failed to comply with *Penry I*.

2. "Nullification."

The Texas Court of Criminal Appeals referred to the instruction in question as a "nullification instruction." J. A. 782. This is a poor choice of words, but the court's choice of words does not open an otherwise final judgment to attack. Cf. *Coleman* v. *Thompson*, 501 U. S. 722, 739 (1991).

"Nullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court . . . ." *United States* v. *Thomas*, 116 F. 3d 606, 614 (CA2 1997). That means the whole law, as conveyed by the whole set of instructions. An

instruction to answer a question in a particular way is not a "nullification" instruction, even if the directed answer is different from the answer to the bare question. Jurors who answer according to the full instructions are obeying, not violating, their oaths.

Roberts v. *Louisiana*, 428 U. S. 325 (1976), relied on by petitioner, is inapposite. In that case, the Court rejected an argument that an impermissibly mandatory capital sentencing statute was actually discretionary, because the jury could return a verdict of a lesser degree of murder. See *id.*, at 334-335. In sharp contrast to the present case, the jury was told not to do that, but only to consider the lesser offense if the evidence did not justify conviction of the greater offense. *Id.*, at 334, n. 10. Although the Louisiana jury had discretion in practice, it was a standardless discretion and depended on their willingness "to disregard the trial judge's instructions." *Id.*, at 335.

In the present case, the jurors were given the *Lockett* definition of mitigation and expressly directed to give a negative finding to one of the special issues if they found that, given the mitigation, a life sentence was appropriate. J. A. 675. No disobedience was required to render a life sentence. The jurors chose the death penalty because they believed it was the appropriate sentence, after considering all the evidence.

3. Studies.

Amicus NACDL cites a number of minimally relevant studies that supposedly show juror confusion in capital cases. Such studies should be taken with the greatest skepticism, as they are often driven by a predetermined agenda and not subject to adversarial testing. "Mere citation of a law review to a court does not suffice to introduce into evidence the truth of the hearsay or the so-called scientific conclusions contained within it." *Ramdass* v. *Angelone*, 530 U. S. 156, 147 L. Ed. 2d 125, 139, 120 S. Ct. 2113, 2123 (2000) (plurality opinion); see also *id.*, 147 L. Ed. 2d, at 140, 120 S. Ct., at 2123 (noting interest of sponsor and dubious methodology). It is very easy to manipu-

late methods or analysis to come up with the desired conclusion. For example, the notorious Baldus study of capital sentencing claimed to show a race-of-the-victim bias, but when the case was actually tried the data were found to show, if anything, just the opposite. *McCleskey* v. *Zant*, 580 F. Supp. 338, 367-368 (ND Ga. 1984), aff'd in part, rev'd in part on other grounds, 753 F. 2d 877 (CA11 1985), aff'd, 481 U. S. 279 (1987).

To take just one example from the studies cited by NACDL, we look at the methodology in Haney and Lynch, Comprehending Life or Death Matters, 18 Law and Human Behavior 411 (1994). College students were read the standard California penalty instruction and then asked in the abstract to formulate their own definitions of the terms "aggravation" and "mitigation." *Id.*, at 419. The students' imperfect product in this sterile, artificial context, see *id.*, at 421, should surprise no one. The students did not receive the evidence and argument or participate in the deliberation that *Boyde* found important. See 494 U. S., at 380-381, 383-386. Further, the task they were asked to perform, formulating a definition, is quite different from the task juries perform and not, as the authors claim, simpler. Cf. Haney & Lynch, at 419, n. 6. Defining legal terms is a task our finest legal minds find challenging. The methodology of this study appears calculated to produce a negative result, and that result therefore has little or no meaning.

4. Context.

Applying the *Boyde* rule to the facts of this case requires considering the instruction in the context of the whole trial. See *Boyde*, *supra*, 494 U. S., at 383. The present case is remarkably similar to *Boyde*. The instruction is not erroneous, but it is claimed to be "ambiguous and therefore subject to an erroneous interpretation." *Id.*, at 380. The jury was presented with copious mitigating evidence and told to consider all of it. *Id.*, at 383. Indeed, in the present case, the jury received more complete instruction on mitigation than in *Boyde*, using the

Lockett language. Compare J. A. 675, with *Boyde*, 494 U. S., at 374, n. 1 (factor (k)); and *id.*, at 374, n. 2 (subsequently amended factor (k)). In both cases, defense counsel argued to the jury the interpretation of the instructions that permitted giving effect to all the mitigating evidence. Compare J. A. 640, with 494 U. S., at 386. In both this case and *Boyde*, and in sharp contrast to *Penry I*, the prosecutor did not deny that interpretation but instead argued, entirely properly, that the circumstances were factually unfounded, not mitigating, or entitled to little weight. Compare J. A. 662-664 (abuse unsubstantiated); J. A. 665-666 (retardation mild, not causally related to criminality, not mitigating, brain damage claim unfounded); and *Boyde*, 494 U. S., at 385 (argument that mitigation was minimal, not that it was not a proper factor), with *Penry I*, *supra*, 492 U. S., at 325-326 (urging jurors to stick to the literal questions). In general *voir dire*, the prosecutor expressly endorsed the concept that the jury could answer a question "no" if the mitigating evidence warranted a sentence less than death and stated flatly that determining what was mitigating was up to them, not dictated by the instructions. J. A. 9-10. He then drove the point home during individual *voir dire*, as described in detail in the state's brief. The state court's application of *Boyde* to the facts of this case is eminently reasonable. It is the opposite conclusion, argued by petitioner, that would be unreasonable.

This case is exactly the kind of case Congress had in mind when it acted to limit the second-guessing of state decisions on federal habeas corpus. See 141 Cong. Rec. 15,064, col. 2 (1995) (statement of Sen. Hatch) (purpose of habeas to correct fundamental defects; reasonable application means no fundamental defect). Nothing horrific happened at Penry's trial. There are no confessions beaten out of prisoners, no lynch mob around the courthouse, and no denial of counsel. Cf. *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting) (proposing limiting collateral review to such fundamental violations). We have a defendant ably represented by counsel who fully presents his mitigating evidence. The prosecution

rebuts firmly but fairly. The trial judge instructs the jury in a careful, conscientious effort to comply both with this Court's complex and constantly changing jurisprudence of the Eighth Amendment and with state law to the extent it is consistent with that jurisprudence. The issue in dispute here raises no question of actual innocence. The argument involves "parsing instructions for subtle shades of meaning." Cf. *Boyde*, *supra*, 494 U. S., at 381. Direct review is enough for such disputes. They do not rise to the level that justifies collateral attack on a final judgment. The state court correctly recognized and reasonably applied this Court's precedents, and that, Congress has decided, ends the case.

IV. The *Estelle* v. *Smith* question under AEDPA is essentially the same as under *Teague*.

Part II of petitioner's brief does not mention 28 U. S. C. § 2254(d) or the cases construing it at all, other than a quotation of the Court of Appeals opinion. See Brief for Petitioner 29. Regardless of which of the exceptions to the general rule of claim preclusion he might invoke, though, none applies. See *supra*, at 9.

What petitioner seeks, in essence, is an extension of the rule of *Estelle* v. *Smith*, 451 U. S. 454 (1981) to a factual setting substantially different from the one in that case. The Texas Court of Criminal Appeals held "*Estelle* is inapplicable to the facts of this case." J. A. 767. That holding was neither contrary to nor an unreasonable application of clearly established law.

Although *Williams* v. *Taylor*, 529 U. S. 362, 407-409 (2000) largely endorsed the interpretation of 28 U. S. C. § 2254(d)(1) in *Green* v. *French*, 143 F. 3d 865, 869-870 (CA4 1998), it neither adopted nor rejected one prong of *Green*. That was *Green*'s assertion "that state court decisions that unreasonably extend a legal principle from our precedent to a new context where it should not apply (or unreasonably refuse to

extend a legal principle to a new context where it should apply) should be analyzed under § 2254(d)(1)'s 'unreasonable application' clause." *Williams*, 529 U. S., at 408. The Court expressly left this question open. *Id.*, at 408-409.

The plurality opinion in *Ramdass* v. *Angelone*, 530 U. S. 156, 147 L. Ed. 2d 125, 135-136, 120 S. Ct. 2113, 2119-2120 (2000) seems to say that *Williams* did accept this prong of *Green*. This is a curious passage. If the opinion is merely summarizing the holding of *Williams*, it is mistaken. A second interpretation is that *Ramdass* went ahead and decided a question *Williams* expressly reserved by simply making a bald statement with no discussion. That seems unlikely. The best interpretation under the circumstances, *amicus* submits, is that the *Ramdass* plurality assumed for the sake of argument that the reserved prong of *Green* was valid and decided the petitioner's claim did not qualify for it. See *id.*, 147 L. Ed. 2d, at 137-138, 120 S. Ct., at 2121. The concurring opinion does not cite or rely on this "unreasonable refusal to extend" test. See *id.*, 147 L. Ed. 2d, at 143-145, 120 S. Ct., at 2126-2128. The question should therefore be regarded as still open.

Amicus CJLF submits that the *Williams* Court's skepticism of this test was well-founded. It is an unnecessary complication of an already complex rule and resolves no issues which cannot be resolved under the other prongs.

Most true "extension" issues are best analyzed under the "clearly established" requirement, where a substantial body of case law already exists. As applied to Supreme Court precedents, "clearly established Federal law" is equivalent to "old rules" under *Teague* v. *Lane*, 489 U. S. 288 (1989). *Williams*, *supra*, 529 U. S., at 412. Conversely, a "new rule" is not "clearly established." "Thus, applying *Teague* principles, 'clearly established federal law as determined by the Supreme Court of the United States' means that the rule sought by petitioner must have been dictated or compelled by" the pertinent Supreme Court precedents. *Harris* v. *Stovall*, 212 F. 3d 940, 944 (CA6 2000).

Much of the *Teague* line of cases deals with extension of existing rules to different situations. *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990) held that extension of the rule of *Edwards* v. *Arizona*, 451 U. S. 477, 485 (1981) to a different offense was a new rule. *Caspari* v. *Bohlen*, 510 U. S. 383, 393 (1994) held that extension of the rule of *Bullington* v. *Missouri*, 451 U. S. 430 (1981) to noncapital cases would be a new rule. *Stringer* v. *Black*, 503 U. S. 222, 228-229 (1992) held that application of the rule of *Godfrey* v. *Georgia*, 446 U. S. 420, 428-429 (1980), on vague death-eligibility circumstances, to a differently worded but substantially equivalent circumstance, was not a new rule. *Lambrix* v. *Singletary*, 520 U. S. 518 (1997) rejected a contention that *Espinosa* v. *Florida*, 505 U. S. 1079 (1992) (*per curiam*) was merely "applying *Godfrey* to Florida's sentencing scheme," see *Lambrix*, 520 U. S., at 542 (Stevens, J., dissenting), rather than a new rule.

Between *Williams*' linkage of *Teague* with "clearly established" and this well-developed body of case law, there is no need for a separate "extension" analysis under the "unreasonable application" clause of § 2254(d)(1). The refusal to extend would only be unreasonable if extension were dictated by precedent, and so the *Teague* case law covers the base. *Williams* involved the unwarranted extension of *Lockhart* v. *Fretwell*, 506 U. S. 364 (1993) to a new context where its rationale did not apply. Part III of Justice O'Connor's opinion, applying the test adopted by a majority in part II, rejects this analysis as contrary to clearly established federal law. See *Williams*, *supra*, 529 U. S., at 413. There is no need to resort to the "unreasonable application" prong for issues of this type.

Petitioner's *Estelle* v. *Smith* claim can be decided under AEDPA the same as it would have been under *Teague*, with the caveat that "clearly established law" is restricted to Supreme Court precedent. See *Williams*, *supra*, 529 U. S., at 412. If the application of the rule of *Estelle* v. *Smith* to these facts was *dictated* by Supreme Court precedent existing in 1995, then the state court decision is contrary to clearly established law and

not protected by § 2254(d)(1). If not, the state court resolution of this issue stands. As we will show in the next part, the present case is so far removed from *Smith* that applying it here would not only be a new rule, it would be a wrong rule.

V. The use of Dr. Peebles' report did not violate *Estelle* v. *Smith*.

Penry claims that the admission of Dr. Peebles' report, along with the District Attorney's references to it at trial, violated *Estelle* v. *Smith*, 451 U. S. 454 (1981), because the report asserted that releasing Penry from custody would be dangerous. See Brief for Petitioner 6, 24. Contrary to Penry's assertion, this does not place *Smith* "in point" with the present case. The *Smith* rule was brought about by "the 'distinct circumstances' of that case, 451 U. S., at 466—the trial judge had ordered, *sua sponte*, the psychiatric examination and Smith neither had asserted an insanity defense nor had offered psychiatric evidence at trial." *Buchanan* v. *Kentucky*, 483 U. S. 402, 422 (1987). *Smith*'s "distinct circumstances" are not present here. Penry's counsel for his prior rape case knew about and approved the examination. Any incriminating statements made during the examination must only have been about the prior rape, a crime for which the defendant's self-incrimination privilege had ended long before the present trial. Penry also raised a mental health issue in the penalty phase, relying in part upon expert testimony to prove his point. This case is thus far beyond the *Smith* rule, which is itself at the outer limits of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Contrary to the petitioner's claims, *Smith* is not "in point." Cf. Brief for Petitioner 25. It is not even close.

A. Smith's Particular Circumstances.

Since the *Smith* rule was a response to the distinct circumstances of that case, an understanding of the particular facts of that case is essential to the proper application of that decision. First, Smith's competency exam was ordered without his

counsel's knowledge or consent. See *Smith*, *supra*, 451 U. S., at 470-471. Smith therefore had no opportunity to consult with counsel before making a crucial decision about his penalty phase defense. See *id.*, at 471. While this fact was most relevant to the Sixth Amendment portion of *Smith*, see *ibid.*, it also influences the Fifth Amendment analysis. *Smith* is an extension of *Miranda*. See *id.*, at 466-467. *Miranda* is itself premised on the need to combat the compulsion inherent in custodial interrogation where the suspect has not yet been able to consult with counsel. See *Miranda*, *supra*, 384 U. S., at 466. The Fifth Amendment analysis is much different if the suspect may first consult with counsel before the examination. See *infra*, at 25.

A second component of *Smith* is that the defense raised no mental health issues in that case. If the defense raises the issue of the defendant's mental health, then both fairness and accuracy require that the defendant submit to an examination conducted by the prosecution's expert. See *Smith*, *supra*, 451 U. S., at 465-466 (summarizing the treatment of the insanity defense in the federal circuits); *Buchanan*, *supra*, 483 U. S., at 423-424. Just as testimony waives the Fifth Amendment privilege with respect to the subject matter of the testimony, see *Mitchell* v. *United States*, 526 U. S. 314, 321 (1999), so the defendant who places his or her mental health at issue must allow the prosecution a reasonable chance to rebut the defense's case. The only mental health evidence in *Smith* was Dr. Grigson's testimony, see 451 U. S., at 458-460, 466, so there was no Fifth Amendment waiver with respect to Grigson's examination of the defendant.

The last part of the *Smith* mosaic is how the state incriminated the defendant through the competency examination. Dr. Grigson's future dangerousness opinion was based largely upon the account of the crime given by Smith during the competency examination. See *Smith*, *supra*, 451 U. S., at 463-464. When the defendant's description of the crime is used as a basis for his death sentence for that particular crime, the Fifth Amendment is clearly implicated. See *Mitchell*, 526 U. S., at 326. Descriptions of past crimes for which the defendant has already been sentenced do not raise these Fifth Amendment concerns. As *amicus* will demonstrate, none of these factors are present in this case. Therefore, *Smith* does not control.

B. Counsel's Choice.

The first major distinction between *Smith* and the present case is that in this case counsel requested the psychiatric examination that generated Dr. Peebles' report, while in *Smith* the trial court ordered the exam without consulting with counsel. See *Penry* v. *Johnson*, 215 F. 3d 504, 511 (CA5 2000); *Penry* v. *State*, 903 S. W. 2d 715, 759-760 (Tex. Crim. App. 1995); *Smith*, *supra*, 451 U. S., at 470-471. In addition to eliminating any Sixth Amendment claim, see *Buchanan*, *supra*, 483 U. S., at 424-425, this fact also mitigates the need to protect the defendant's self-incrimination privilege through the *Miranda* warnings. Since *Smith*'s Fifth Amendment holding is simply an extension of *Miranda*, see *Smith*, *supra*, 451 U. S., at 469, if the *Miranda* warnings were unnecessary during Dr. Peebles' examination, then *Smith* does not support defendant's Fifth Amendment claim.

The *Miranda* rule is premised upon the inherent compulsion of uncounseled custodial interrogation. See *Miranda*, *supra*, 384 U. S., at 465-466. Counsel plays a vital role in mitigating this pressure in *Miranda*'s scheme. "The rule in *Miranda* . . . was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979). Consultation with counsel before questioning would substantially alleviate the inherent pressures on the suspect that brought about *Miranda*. In the *Smith* context, consultation with counsel can help make the defendant aware of the potential consequences of the examination, and his right not to answer certain questions, as counsel can be trusted

to adequately warn his client. Cf. *Smith*, *supra*, 451 U. S., at 468 (suspect not informed of the potential gravity of the examination). The *Smith* Court sought to prevent the defendant from providing unwitting assistance to the state's case for executing him. See *id.*, at 466. Where the defendant's counsel has requested the psychiatric examination, this threat is minimized.

It is true that consultation with counsel does not by itself satisfy *Miranda* as applied to the interrogation room. Thus, the defendant has the right to have an attorney present during custodial questioning in addition to any prior consultation with counsel. See *Miranda*, *supra*, 384 U. S., at 470. But no similar right exists with respect to psychiatric examinations. In *Smith*, the defendant did not even assert a right to the presence of counsel during his examination. *Smith*, *supra*, 451 U. S., at 470, n. 14. "In fact, the Court of Appeals recognized that 'an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination.' " *Ibid.* Although this statement addressed the Sixth Amendment right to counsel rather than *Miranda*, and was dictum, the *Miranda* rule does not include a right to counsel's presence during a psychiatric examination. An effective psychiatric examination is impossible so long as a third party like defense counsel is present. Therefore, under *Smith*, consultation with counsel is sufficient.

"The real teaching of *Miranda*, and *Estelle*'s application of it, is not a rigid formula, but that the Fifth Amendment must be protected." *People* v. *Wright*, 430 N. W. 2d 133, 139 (Mich. 1988). When counsel has arranged for the examination, the concerns that prompted the holdings of *Smith* and *Miranda* are abated. The defendant can go into the examination with the complete knowledge of his rights. Cf. *id.*, at 138 (*Smith* distinguished where examination took place "after [defendant] . . . had the assistance of counsel throughout the trial"). Although Penry's counsel in the prior rape case almost certainly did not warn him about the potential use of Dr. Peebles'

conclusions to support a death sentence for some future capital crime, this does not change the analysis. Instead, as the next section demonstrates, the impossibility of predicting the future use of the examination simply underscores the fact that Dr. Peebles' interview with the defendant and his subsequent report did not incriminate Penry.

C. No Incrimination.

Perhaps the most telling difference between this case and *Smith* is that Penry's examination took place before he committed the capital murder that is the subject of the present case. Because Dr. Peebles' examination of him took place to determine his competency to stand trial for a separate, earlier crime, the admission of Dr. Peebles' statement in the 1990 capital murder trial did not violate Penry's self-incrimination privilege.

The *Smith* Court found a violation of the Fifth Amendment privilege because the expert's future dangerousness finding in that case largely relied upon Smith's account of the murder during his examination by Dr. Grigson. See *Smith*, *supra*, 451 U. S., at 464. Thus, while in *Smith* "the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist," *id.*, at 462, that was not true at the time Dr. Peebles examined Penry. The examination only threatened Penry's interest after his subsequent rape and murder of Pamela Carpenter. While the self-incrimination privilege may protect the suspect from the ghosts of crimes past and present, it cannot extend to crimes yet to come.

If Penry's Fifth Amendment privilege was violated in this interview, it could only have been with respect to the 1977 rape case for which the examination was conducted. A suspect's privilege against self-incrimination is not eternal. "It is true, as a general rule, that where there can be no further incrimination, there is no basis for the assertion of the privilege. We conclude *that principle applies to the cases in which the sentence has been fixed and the judgment of conviction has become final.*" *Mitchell*, *supra*, 526 U. S., at 326 (emphasis added).

Dr. Peebles' statement was admitted long after Penry had pleaded guilty and been sentenced for the 1977 rape. Although the privilege survives the guilt verdict and extends into the sentencing phase of the trial, *id.*, at 325, it does end after sentencing. Since Penry could no longer be incriminated with respect to the 1977 rape case, admitting Dr. Peebles' report at the trial for the subsequent rape and murder did not violate his Fifth Amendment rights. This report was simply part of Penry's psychological history, just like the school and institutional records routinely considered in such cases.

D. The Complete Picture.

The final major difference between *Smith* and this case is that Penry made his mental state an issue in this case. At the sentencing hearing, the defense called as an expert Dr. Randall Price, a psychologist who testified about "neuropsychology, organic brain damage, mental retardation, and the effects of malingering on various psychological tests." *Penry* v. *State*, *supra*, 903 S. W. 2d, at 763. As part of the basis for his opinion on Penry's mental retardation, Dr. Price relied on Dr. Peebles' report. J. A. 327. Since Penry utilized both mental health expert evidence and Dr. Peebles' report, Texas cannot be faulted for providing the jury with the complete picture of Dr. Peebles' assessment of Penry.

When the defendant "presents psychiatric evidence, then, at the *very least*, the prosecution may rebut this presentation with reports of the examination that the defendant requested." *Buchanan*, *supra*, 483 U. S., at 422-423 (emphasis added). The present case is thus far closer to *Buchanan* than it is to *Smith*. Dr. Peebles' reexamination was done at the request of Penry's counsel, and the report that followed was relied on partly by defendant's psychiatric witness in an attempt to convince the jury that he did not deserve the death penalty because he was mentally retarded. Texas deserved its fair chance to rebut Penry's case.

The fact that the defense's expert only addressed Penry's alleged mental retardation and not his future dangerousness does not change the analysis. While Penry was able to argue that his mental condition made him undeserving of a death sentence, see Part III B, *supra*, the state must also be able to rebut this by arguing that his condition makes him a continuing danger to society. That is the conclusion reached by Dr. Peebles' report. See J. A. 60. Dr. Peebles was tragically right, as Penry raped and murdered Pamela Carpenter only two years after the 1977 rape.[2]

Thus Penry's claim that the Fifth Amendment waiver doctrine did not support admitting Dr. Peebles' report cannot stand. It is true that the act of testifying only waives the self-incrimination privilege with respect to the contents of the testimony. See *Mitchell*, *supra*, 526 U. S., at 321. However, the report cannot be neatly cleaved from Penry's case, since his own expert relied on it, and it helped rebut psychiatric evidence that Penry introduced. "Nice questions will arise" concerning the scope of the initial testimony and whether the cross-examination "are comprehended within its scope . . . ." *Id.*, at 321-322. The waiver issue is at best a "nice question," precisely the kind of question Congress decided to limit to direct review. See *supra*, at 19.

Letting Texas provide the jury with an accurate picture of Penry's mental state is fair. He cannot complain about the state utilizing a report that his own expert relied upon to introduce the issue of his mental retardation. Penry's self-incrimination interest in a report concerning an earlier crime for which he has already served his sentence is remote at best. Furthermore, his need for the *Miranda* warnings before the examination was ameliorated by his counsel's request for the exam. Under these

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2. As the state argues in its brief, admission of the report was surely harmless, even if error. A mere psychiatrist's *prediction* of future dangerousness on top of Penry's *actual*, subsequent acts of rape and murder is like a feather on top of an anvil.

circumstances *Smith* is not controlling, and Penry's Fifth Amendment right was not violated.

The present case is materially distinguishable from *Smith*, and extension of *Smith* to the context of the present case is not dictated by Supreme Court precedent. Therefore, 28 U. S. C. § 2254(d)(1) precludes collateral attack on the final judgment of the Texas Court of Criminal Appeals.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

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Respectfully submitted,

KENT S. SCHEIDEGGER
Counsel of Record
CHARLES L. HOBSON
Attorneys for Amicus Curiae
Criminal Justice Legal Foundation